Supreme Court, U.S.
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No. 98-1744

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JAMES TAYLOR,

Petitioner,

v.

SUSAN MONFILS, as special administrator of the Estate of Thomas Monfils, SUSAN MONFILS, THERESA MONFILS, and JOHN-THOMAS MONFILS, by Bruce R. Bachhuber, guardian ad litem,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondents charged only petitioner, Deputy Chief Taylor, with violating Thomas Monfils' constitutional right to due process under the state-created danger theory indicated in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). Respondents did not charge any other individual officer of the Green Bay Police Department with violating Monfils' due process right. Consequently, Taylor's conduct alone is determinative of whether there was a due process violation.

1. Respondents' reliance on the conduct of the entire Police Department to establish a due process violation by petitioner under the state-created danger theory is inappropriate.

Respondents claim that "Taylor and other police personnel subordinate to him" created the tape and then proceeded to produce it for Keith Kutska. (Brief in Opposition, p. 15). This claim is erroneous. It is undisputed that Taylor did not create the tape and he did not release it to Kutska.

Respondents then claim that it was the "police themselves" who made the tape and, thus, that it was the "police themselves" who created the very conditions from which Monfils needed protection in the first place; further, that it was "Lt. Michael Mason, with help from Records Office Manager Shay Gierczak, who swallowed Kutska's claim to have been defamed" and released the tape. (*Id.*, pp. 15, 23)

These claims are irrelevant. Taylor did nothing to facilitate the release of the tape. He did not direct Lieutenant Mason or anyone else to release the tape. He did not know the tape was about to be released. He did not know that Lieutenant Mason had "taken it upon himself to find a copy of the recording," and he did not know that Lieutenant Mason had placed the tape in the Records Office "less than 30 feet" from his own office. (*Id.*, p. 16) Respondents cannot use the state-created danger theory to establish a due process violation by Taylor by making him the scapegoat for the alleged faulty conduct of other personnel in the Police Department.

2. Petitioner's inaction towards respondents' decedent is not a basis for the imposition of liability under the state-created danger theory.

Proper focusing on Taylor's conduct rather than on the conduct of the entire Green Bay Police Department makes it abundantly clear that Taylor committed no affirmative acts which created or increased a danger to Monfils.

Taylor had one brief anonymous phone conversation with Monfils during which he told Monfils he would check on the tape and put a note in Monfils' police report that the tape should not be released. Shortly afterwards, Taylor received a call from Assistant District Attorney Hitt, who said he had gotten a similar anonymous call, that the caller sounded scared, and that in his (Hitt's opinion) the tape should not be released. Hitt offered to call Lieutenant Lampkin to make sure the tape was not released, but Taylor said he would take care of it and put

a note with the police report. Taylor then checked the computer, found no report of Monfils' call, concluded there was nothing he could do, and did nothing further.

Neither Taylor's knowledge of the danger to Monfils nor his promise to do something to prevent release of the tape gives rise to an affirmative duty to protect Monfils. *DeShaney*, 489 U.S. at 200. Taylor's conduct was not affirmative misconduct for the purpose of respondents' § 1983 claim; rather, it constituted a failure to act. As was true in *DeShaney,* Taylor did not "create" the danger to Monfils; he simply failed to provide adequate protection from it. As in *DeShaney*, the most that can be said of Taylor is that he "stood by and did nothing when suspicious circumstances dictated a more active role for [him]." 489 U.S. at 203. This case is purely an omission or "failure to act" case which, under *DeShaney*, is nonactionable under § 1983.

Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990), and *Ross v. United States,* 910 F.2d 1422 (7th Cir. 1990), which respondents find "more comparable" to the instant case than any other, actually support this conclusion. In *Freeman*, the court considered an allegation that a woman and her daughter were killed by the woman's estranged husband after the chief of police had directed his officers to ignore her pleas that they stop the husband, who was a "close bosom buddy" of the police chief, from threatening and intimidating her. The Eighth Circuit concluded that *DeShaney* would not bar a § 1983 action based on the allegation that the police chief had affirmatively interfered with the conduct of other officers:

> [Such an allegation] presents a claim that the violence the decedents were subjected to was not solely the result of private action, but that it was also the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available in the community—with such interference increasing the vulnerability of [the victim] to the actions of [the private individual] and possibly ratifying or condoning such violent actions on his part. . . . Without such affirmative actions on the part of the chief of police, the danger faced by the [victim] would have arguably been less." (911 F.2d at 54-55)

In *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990), a friend summoned help for a 12-year-old boy who fell into a lake. Within 10 minutes two lifeguards, two fire fighters, one police officer and two scuba-diving civilians responded. However, before they could attempt a rescue, a county deputy sheriff on lake patrol arrived in a marine patrol boat and insisted on enforcing a county policy that only the city's fire department divers could perform rescues. The deputy ordered all rescue attempts to stop. When the civilian scuba divers offered to attempt a rescue at their own risk, the deputy threatened to arrest them and even positioned his boat so as to prevent their dive. Twenty minutes later, the officially authorized divers pulled the boy from the water, and he later died. The court found that the complaint stated a claim against both the county and the individual deputy.

The lesson of *Freeman* and *Ross* is that an officer cannot "arbitrarily assert [his] power so as to cut short a person's life." 910 F.2d at 1433. There is no evidence here

that Taylor used his power "so as to cut short [Monfils'] life." There is no evidence that Taylor knew Lieutenant Mason was ready to release the tape to Kutska and allowed that to happen. There is also no evidence that Taylor used his official power to do anything to prevent Hitt from pursuing the matter or from directly contacting Lieutenant Lampkin. The only things respondents can point to in support of their assertion that Taylor acted affirmatively to deter Hitt from preventing the release of the tape are Taylor's statement to Hitt that he would "take care of" the situation and respondents' conclusion that, absent Taylor's assurance, Hitt would have called Lampkin directly.

It was not Taylor, however, that prevented Hitt from calling Lampkin. Hitt himself chose not to call Lampkin. Taylor did not, verbally or physically, restrain Hitt from calling Lampkin. Hitt simply assumed that after speaking with Taylor, he did not need to. Likewise, nothing prevented Hitt from calling Taylor to see if Taylor had taken care of the matter. For Taylor to be liable under § 1983, he must have done something more than say "I'll take care of it."

Affirmative action, not inaction, is the predicate for liability under § 1983. Under *DeShaney*, Taylor's inaction is insufficient to establish a constitutional due process violation. The opinion of the Court of Appeals below represents an unprecedented expansion of the "state-created danger" theory in holding that Taylor is liable for his "inaction" in not taking affirmative steps to prevent the release of the tape. This holding directly contradicts this Court's caution against expanding the concept of

substantive due process (*Collins v. Harker Heights*, 503 U.S. 115, 125 (1992), and simply invites unnecessary litigation over whether omissions by public officials establish a substantive due process violation.

CONCLUSION

For the foregoing reasons, in addition to the reasons set forth in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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